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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1936

No. [redacted] 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDER, Receivers, *Petitioners*,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING CO., Debtor, *Respondent*.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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To the Honorable, the Justices of the Supreme Court of the United States of America:

COMES NOW the respondent, David Donoghue, Trustee of Trinity Refining Company, Debtor, and presents this, his brief in opposition to the petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and respectfully shows to the Court:

PROPOSITIONS UPON WHICH RESPONDENT RELIES

1.

The Bankruptcy Court properly took from the state receivers in the penalty suit the properties of the debtor, because the lien sought to be enforced in that suit came into existence through legal proceedings within four months of the date of the filing of the petition for re-organization, and was void, and the opinion of the Circuit Court of Appeals in so holding is not in conflict with Henderson vs. Mayer, 225 U. S. 631, 56 L. Ed. 1233.

2.

The filing of the petition in the State Court for the recovery of gasoline taxes and for the foreclosure of the statutory lien and the refusal of the State Court to appoint a receiver when the petition was first presented, did not have the effect of vesting the State Court with exclusive jurisdiction of the properties of the debtor subject to the lien, and the opinion of the Circuit Court of Appeals is not in conflict with the following cases: Farmers Loan & Trust Co. vs. Lake Street Elevated Railway Co., 177 U. S. 51, 44 L. Ed. 667; Peck vs. Jenness, et al., 7 Howard 612, 12 L. Ed. 841; Wabash Ry. Co. vs. Adelbert College, 208 U. S. 38, 52 L. Ed. 379; Buck vs. Colbath, 3 Wallace, 70 U. S. 334, 18 L. Ed. 257; Palmer vs. Texas, 212 U. S. 118, 53 L. Ed. 435; Lion Bonding Co. vs. Karatz, 262 U. S. 77, 67 L.

Ed. 871; Harkin vs. Brundage, 276 U. S. 36, 72 L. Ed. 457; Penn. General Casualty Co. vs. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850; United States vs. Bank of New York and Trust Co., 296 U. S. 463, 80 L. Ed. 330; Straton vs. New, 283 U. S. 318, 75 L. Ed. 1060; Bryan vs. Speakman, 53 Fed. (2d) 463; In Re White Star Refining Co., 74 Fed. (2d) 269; Duparquet vs. Evans, 297 U. S. 216, 80 L. Ed. 591.

3.

The jurisdiction of the Bankruptcy Court in re-organization proceedings under 77 (b) is complete and exclusive, and the Court is entitled to the possession of the properties of the debtor wherever located, and regardless of whether they are in the custody and control of another court.

4.

The Circuit Court of Appeals did not err in holding that the petroleum which the State sought to confiscate was not a nuisance per se, that the title to it was in the debtor at the time the petition for re-organization was filed, and that it passed to, and is held by, the trustee as part of the debtor's estate.

5.

The confiscation statute of Texas (Sec. 10, Art. 6066a, Revised Statutes of Texas) providing for confiscation by the State of so-called illegal oil is void and unconsti-

tutional for that it contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

6.

Article 6066 (a), Sec. 10, Revised Statutes of Texas, providing for forfeiture to the State of so-called unlawful oil is a direct burden on interstate commerce and contravenes Article 1, Sec. 8, Clause 3 of the United States Constitution.

Statement and Argument Under Respondent's First Proposition

Statement

The petitioners contend that the Bankruptcy Court was without jurisdiction to take over the custody of the properties of the debtor because at the time they were so taken over, the properties were in the custody of state receivers appointed in a cause in which the State of Texas sought to recover of the debtor and certain other defendants, the sum of $791,000.00 in fines and penalties for alleged violation of State conservation acts. The petitioners contend that the State had a statutory lien upon the properties of the debtor to secure the payment of the fines and penalties. The statute under which petitioners claim the lien is Article 1373, Revised Statutes of Texas, as follows:

"The state shall have a lien on all such property from the date that suit shall be instituted by the Attorney-General or County Attorney acting under his direction, in any court of competent jurisdiction within the State, for the purpose of forfeiting the Charter or cancelling the permit of such corporation, or for such fines and penalties. The institution of such suit for such fines, penalties or forfeitures shall constitute notice of such lien." (See p. 2, Opinion of Circuit Court of Appeals.)

The companion statute to the one just quoted is Article 1372, Revised Statutes of Texas, which is as follows:

"Whenever any domestic or foreign corporation in this state shall violate the laws of this state, including the law against trusts, monopolies and conspiracies or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this state at the time of such violation, or which may thereafter come within this state, shall, by reason of such violation, become liable for such fines or penalties and for cost of suit and cost of collection."

The Circuit Court held (0.4) that the lien relied upon by petitioners came into existence through legal proceedings, and as it was so created within four months of the filing of the petition for re-organization, it was

void under Section 67 (f) of the Bankruptcy Act (11 U.S.C.A., Sec. 107 (f)).

Argument

After diligent search, we have been unable to find any case by a Texas Court construing Article 1373 above referred to. We have found one case in which the Statute was involved (*Waters Pierce Oil Co. vs. State*, 103 S.W. 840), but the court made no attempt to pass on the question of when the lien came into existence.

It is readily apparent, we think, that the lien discussed in *Henderson vs. Mayer*, 225 U. S. 631, 56 L. Ed. 1233, is vastly different from the lien asserted by the State in this instance. The one, as pointed out by the Court, was an inchoate lien given by statute, of which all creditors were bound to take notice, and subject to which they were presumed to have contracted when they dealt with the insolvent. The other has no character of existence prior to the institution of the suit, nor could any creditor, dealing with the debtor, foresee that it might arise.

The word "inchoate" is defined by the New Standard Dictionary thus: "Existing in its elements or in an incipient state; begun or entered upon but not in full existence or operation." And, by Words and Phrases: "Imperfect; unfinished; begun but not completed." Clearly the landlord's lien in the *Henderson vs. Mayer* case was within those definitions, and equally clearly the lien of

the State sought here to be invoked by petitioners is not within those definitions.

The fact that the asserted lien is held in connection with a debt not dischargeable in bankruptcy does not prevent it from being voided. *In Re Green*, 179 Fed. 870.

Statement and Argument Under Respondent's Second and Third Propositions

Statement

The petitioners contend that the Bankruptcy Court had no power to direct its trustee to take possession of the Trinity Refining Company and its property because, on Dec. 14, 1935, about four days prior to the institution of the re-organization proceeding, the State of Texas had filed a suit in one of the State Courts of Travis County against the corporation and certain other defendants in which it sought to collect the sum of $104,-084.47 alleged to be due the State as gasoline taxes, and in said suit sought to foreclose a statutory lien upon the property of the debtor and requested the appointment of a receiver of the debtor's properties, pending the foreclosure of the lien. (Record p. 120.)

Upon the presentation of that petition to the State Judge, he declined to appoint a receiver. (Record p. 120-121.) Later, and after the institution of the re-organization proceeding, and the seizure of the property by the Federal Trustee, an amended petition in the tax

suit was filed by the State, and the State Court undertook to appoint receivers.

The Circuit Court of Appeals held that the State Court did not, by the filing of the tax suit, and the refusal of the State Judge to appoint a receiver on Dec. 14, 1935, acquire jurisdiction over the properties of the debtor to the exclusion of other courts and the Trustee in re-organization lawfully took over the custody of the property. This the petitioners assign as error.

Argument

We do not believe that the opinion of the Circuit Court of Appeals is in conflict with any of the cases cited by the petitioners. Some of them, *Farmers Loan & Trust Co. vs. Lake Street Elevated Ry. Co.* 177 U. S. 51, 44 L. Ed. 667; *Peck vs. Jenness, et al.*, 7 Howard 612, 12 L. Ed. 841; *Wabash Ry. Co. vs. Adelbert College*, 208 U. S. 38, 52 L. Ed. 379; *Lion Bonding Co. vs. Karatz*, 262 U. S. 77, 67 L. Ed. 871; *United States vs. Bank of New York and Trust Co.*, 296 U. S. 363, 80 L. Ed. 330; *Straton vs. New*, 283 U. S. 318, 75 L. Ed. 1060; *Byran vs. Speakman*, 53 Fed. (2d) 463; *In Re White Star Refining Co.*, 74 Fed. (2d) 269, are clearly not in point here.

In *Buck vs. Colbath, 3 Wallace;* 70 U. S. 334, 18 L. Ed. 257, the Court held that whenever property has been seized by an officer of the Court by virtue of its process, the property is to be considered as in the custody of that Court to the exclusion of other courts, but point-

ed out that the principle has its limitations and that it is only while the property is in the possession of the Court, either actually or constructively, that the exclusive possession exists.

In *Palmer vs. Texas*, 212 U. S. 118, 53 L. Ed. 435, the Court held that the fact that an appeal had been taken to the Court of Civil Appeals of Texas from an order of the State District Court appointing a receiver did not oust the State Court of its exclusive jurisdiction.

In *Harkins vs. Brundage*, 276 U. S. 36, 72 L. Ed. 457, a stockholders bill had been filed in the State Court and a receiver prayed for, but receivers were not actually appointed. Five days later, and before the appointment of State Receivers, a creditors bill was filed in the Federal Court, Federal Receivers were appointed and took charge of the property. Mr. Chief Justice Taft declared:

> "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction the court which first obtains jurisdiction and constructive possession of the property by filing the bill, is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cog-

nizance of the other, or there is no constructive possession of the property in dispute by the filing of the bill; it is the date of the actual possession of the receiver that determines the priority of the jurisdiction * * * *. We conclude that if the decision of this motion turned on the question of priority of jurisdiction on the face of the two bills, it could not be said that the courts were exercising concurrent jurisdiction."

The opinion then discusses the fact that the delay in the appointment of the receivers by the State Court was caused by certain frauds perpetrated on the State Court for the sole purpose of permitting the creditors bill to be filed in the Federal Court and receivers to be appointed by the Federal Court. It was ordered that the Federal Receivers surrender the property to the State Court, but was further said:

"It is quite true, as already said, that if there had been no chicanery in the delay of the proceedings in the State Court, the difference between the two proceedings would have justified the retention of the jurisdiction by the Federal Court."

In *Penn. General Casualty Co. vs. Pennsylvania*, 294 U. S. 189, 79 L. Ed. 850, the Court said:

"Where the assertion of jurisdiction by the two courts (State and Federal) is nearly simultaneous, it becomes important, as in the present case, to determine the precise time when the jurisdiction at-

taches. If the two suits do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property pendente lite, the time of acquiring actual possession may perhaps be the decisive factor * * * but when the two suits have substantially the same purpose and the jurisdiction of the two courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as a constructive possession of the property and as authorized to proceed with the cause."

We think that the opinion of the Circuit Court of Appeals in the present case is supported by, and not in conflict with, these latter cases. Certainly it cannot be said that the suit in the State Court for the collection of taxes and the re-organization proceedings in the Federal Court had substantially the same purpose. The jurisdiction of the two courts could not then have been concurrent; neither court could act effectively without acquiring possession and control of the property pendente lite. Therefore, the court which actually acquired possession and control of the property, rather than the court in which the bill was first filed, was entitled to retain possession of the res.

Certainly it could not be said that the effect of the act of the State Judge in declining to appoint receivers

when the petition was first presented to him, and thus take possession of the res, was to draw to the State Court, in fact, the possession and custody of such res. This would be to say his act accomplished the very thing he declined to do.

In the case of *Shields vs. Coleman*, 157 U. S. 168, 39 L. Ed. 660, the Supreme Court said:

> "While the validity of the appointment (of the receiver) made by the Circuit Court on June 6, 1892, cannot be doubted, yet, when that court thereafter accepted a bond in lieu of the property, discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver, and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching the property."

If, by vacating an order appointing a receiver, and discharging the receiver, a court releases its exclusive right to the custody of the property and leaves the way open for other courts to attach their jurisdiction to the property, then it would seem that an order of a court declining to appoint a receiver in the first place would

leave the property so that it might be seized by other courts.

One must believe that Congress, when it passed 77 (b), had in mind the previous decisions of the Courts holding that in ordinary bankruptcy proceedings the bankruptcy court was not authorized to oust receivers of other courts holding property of the bankrupt as an incident to the foreclosure of valid, specific liens, and that when Congress used the broad language it did use in 77 (b), it meant for the bankruptcy court, when acting under that section, to have much broader powers than in ordinary bankruptcy cases, and that it fully intended that the re-organization court should have power to take over from all receivers, regardless of the character of the suit in which they were appointed, all the properties of the debtor held by them. 77 (b) fully protects vested interest by requiring that a plan of re-organization be filed, and that the plan contain provisions fully protecting lien holders and vested interests. 77 b (c) (10); (b) (5). For these reasons, we are unable to agree with the holding of this Court in *Duparquet Huot and Moneuse Co. vs. Evans*, 297 U. S. 216, 80 L. Ed. 591.

Regardless of this, however, we find nothing in *Duparquet, Huot and Monuese Co. vs. Evans*, in any way in conflict with the decision of the Circuit Court of Appeals in the present case. In that case the Court, through Mr. Justice Cardozo, was speaking of valid specific liens

and property in the actual possession of State Receivers, pending the foreclosure of such liens.

It is difficult to understand how corporate re-organizations under Sec. 77 (b) can accomplish the purpose which Congress evidently intended, if the Federal Courts find themselves ousted of jurisdiction over the properties of debtors simply because somewhere, in some other court, a suit is pending for the foreclosure of liens upon such property. We can see how comity and a respect for the jurisdiction of other courts might require a Federal Court, operating under Sec. 77 (b) to decline to interfere with property actually in custody of the other court in which a valid, specific lien was in the process of being foreclosed, but there seems to us to be a vast difference between merely assuming jurisdiction over and taking possession of property, upon which a foreclosure suit is pending in some other court, and in actually wresting the property from the hands of the officers of another court.

Statement and Argument Under Respondent's Fourth Proposition

Statement

The State of Texas contends that it should be permitted to institute confiscation proceedings against approximately 69,000 bbls. of oil now in the possession of the Trustee. (Records p. 126.) The title to the oil was

in the debtor at the time the petition for re-organization was filed. (Record p. 158-159.) The Circuit Court of Appeals held that the oil was valuable property and was not a nuisance *per se*, that it passed to the trustee as a part of the debtor's estate, and that it was properly in the custody of the Bankruptcy Court.

Argument

The confiscation statute, under which the State seeks to move, is Article 6066, (a), Sec. 10, Revised Statutes of Texas, and is set out in appendix C of Petitioners' Brief. We agree with petitioners that this and related statutes are penal in the international sense, and we agree that it cannot be enforced by the courts of a foreign jurisdiction, including the Federal Bankruptcy Court. But, to grant the motion of the State and permit it to institute in a State Court confiscation proceedings against this oil would be, we think, to do the very thing which the petitioners and Judge Hutcheson, in his dissenting opinion, say the Bankruptcy Courts could not do,—that is, move to the enforcement of the penal laws of a state. There is no controversy, of course, about the title to this oil being in the debtor and hence in the trustee in bankruptcy, unless it can be said that at the very instant the alleged unlawful acts were committed, which the State claims has made the oil liable to condemnation, the oil was then and there forfeit, and that the judicial proceedings prescribed by Article 6066 (a), Sec. 10, Revised Statutes of Texas, are merely for the purpose of

enforcing the already existing forfeiture. We realize that in *United States vs. 1960 Bags of Coffee*, 8 Cranch 298, 3 L. Ed. 603, the Court held that the forfeiture of the coffee occured at the instant the unlawful importation occurred, and that in many other cases of like character it has been held that the judicial proceedings and seizure of the property were the consequence of the forfeiture and not its cause. As was pointed out in *United States vs. Grundy*, 3 Cranch 351, 2 L. Ed. 459, however,

> "Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either pass immediately from or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute."

We know of no case by a Texas Court in which this statute has been construed. But, construing the statute according to the plain import of the words used, it is clear that it was not the intention of the legislature that the forfeiture should occur until the steps prescribed by the statute should be complied with. Paragraph (a) of Section 10 of the Statute provides:

> "All unlawful oil and unlawful products regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance and *shall be forfeited to the State as hereinafter provided* * * * * *. (Italics ours.)

Paragraph (b) of the same Section declares:

> "When the Attorney-General is advised from any source of the presence and existence of unlawful oil and/or unlawful products, it shall be his duty to institute a suit in rem against such unlawful oil * * *."

Paragraph (c) of the same Section provides:

> "* * * if upon trial of such suit, the oil or product in controversy is found to be unlawful oil or unlawful products, then the court trying said cause shall render judgment forfeiting the same to the State of Texas and authorizing the issuance of an order of sale," etc.

The language used excludes the idea that the forfeiture occurs prior to the entry of judgment of condemnation.

If this is true, then good and lawful title to the oil in controversy here is in the trustee in bankruptcy and the debtor. This being the case, if the Bankruptcy Court should direct that the trustee surrender this oil to the State for confiscation, such action would plainly be in aid of the enforcement by the State of one of its penal laws, and in violation of the rule that: "The courts of no country execute the penal laws of another."

In addition to this, the petitioners are asking the Court to do an unreasonable thing. Petitioners admit that this trustee has the actual possession of the oil in

question, but ask this Court to sustain their demand that the Bankruptcy Court direct this trustee to surrender to petitioners the oil in question upon their naked allegation that it is unlawful oil. Even though this Court were to hold that the principle invoked in *United States vs. 1960 Bags of Coffee*, supra, applies here, the Bankruptcy Court ought still to have the right to pass upon the question of whether or not the oil is in fact unlawful, and until and unless the Bankruptcy Court finds that the petitioners' allegations that the oil is subject to forfeiture are true, the Bankruptcy Court should retain possession of the oil and decline to permit the institution of the confiscation proceedings.

Statement and Argument Under Respondent's Fifth Proposition

Statement

This respondent urged in the Circuit Court of Appeals that the confiscation act aforesaid is unconstitutional and void because it contravenes the due process clause of the Fourteenth Amendment to the United States Constitution. That Court found it unnecessary to pass on the question. (p. 5 of the majority opinion, p. 159 of the Record.)

Argument

Oil has long been recognized as a legitimate article of commerce. *Gilette vs. Mitchell*, 214 S.W. 619; 31 Tex.

Jur. p. 520; *State of Indiana vs. Indiana and Ohio Oil Co.*, 120 Ind. 575, 6 L.R.A. 579, 22 N.E. 778; *Ohio Oil Co. vs. Indiana*, 177 U. S. 190, 44 L. Ed. 729.

The Legislature of Texas undertakes to say that any oil produced or transported in violation of the laws of the State or the orders of the railroad commission is a nuisance and shall be forfeited to the State. In a famous opinion of the Supreme Court of Alabama, *First Avenue Coal Co. vs. Johnson*, 54 So. 598, 3 L.R.A. (ns) 552, it was said:

> "The Constitutional right of the citizen cannot be abridged or destroyed under the guise of police regulations. The legislature, therefore, cannot, by its mere ipse dixit, make that a nuisance which is not in fact or in truth a nuisance, or akin thereto. That which has none of the elements or characteristics of a nuisance, that has no capacity or tendency to injure the public health, the public morals, the public interests, cannot be made a nuisance by the legislature under the guise of the police regulations declaring it to be so."

In the case of *People vs. Steele*, 40 Pac. (2d) 959, the California Court of Appeals said:

> "It is a general rule, * * * * * that the violation of a penal statute does not constitute a nuisance unless the doing of the prohibited acts would constitute a nuisance in the absence of the statute. 46 C. J. p. 660."

In *Crossman vs. City of Galveston*, 247 S.W. 810, the Supreme Court of Texas held a municipal ordinance unconstitutional, saying:

> "The ordinance declares that all delapidated buildings are nuisances, even though none of the elements necessary to constitute a nuisance may exist. It does not require that such building shall injure, hurt or harm anyone. It is not limited to those instances where the delapidated buildings may 'hurt or annoy the lands, tenements or hereditaments of another.' It is not confined to those delapidated buildings which endanger life or health, violate the laws of decency or obstruct the reasonable and comfortable use of the property, or which are subsersive of public order, decency or morals, or which constitute an obstruction of public right. It amounts merely to a general condemnation of delapidated buildings as nuisances and authorizes their destruction. It is apparent that, even with express legislative sanction, such a definition of a nuisance would be void. Not even the legislature can declare that a nuisance which is not so in fact."

The Supreme Court of the United States, in *West vs. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, in discussing the case of *Ohio Oil Co. vs. Indiana*, supra, said:

> "The statute (in question in the case discussed), was one of true conservation, securing the rights of property, not impairing them. Its purpose was to

secure to the common owners of the gas a proportionate acquisition of it,—a reduction to possession and property,—*not to take away any right of use or disposition after it had thus become property.* It was sustained because such was its purpose; and we said that the surface owners of the soil were owners of the gas as well and could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it in possession. * * * The Oklahoma statute far transcends the Indiana statute. It does what this Court took pains to show that the Indiana statute did not do. * * * It does not alone regulate the right of the reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attribute of the property,—the right to dispose of it. * * * Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and when reduced to possession is his individual property, subject to sale by him and may be subject of intra-state commerce and inter-state commerce." (Italics ours.)

In *Lawton vs. Steele*, 152 U. S. 133, 38 L. Ed. 385, the Supreme Court declared:

"To justify the State in thus interposing its authority in behalf of the public, it must appear first

that the interest of the public generally as distinguished from those of a particular class, require such interference." And second, "that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon the individual. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupation. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In that case the Court upheld the statute of New York, denouncing certain fish-nets as nuisances and providing for their seizure and confiscation. But in so doing, the court used this significant language:

"Many articles, such, for instance, as cards, dice and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases, fall within the ban of the law and may be summarily destroyed. *It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose,* but where *minor articles* of personal property are devoted to such use, the fact that they may be used for a lawful purpose

would not deprive the legislature of the power to destroy them." (Italics ours.)

As we said in our brief in the Circuit Court of Appeals, there can be no question, surely, that oil produced or transported in violation of some state conservation law or rule or regulation is just as valuable, can be put to every legitimate use and can serve the world in all things as well as oil that has been produced and transported strictly in accordance with the conservation laws and the rules of the railroad commission. There is nothing inherently vicious about the oil itself, and it must be apparent to all that in passing the confiscation act the legislature did not seriously believe that the oil was actually a nuisance and that the public interests required its abatement, because the very statute which declares it a nuisance makes provision for it to move on into commerce. If it is unfit to be an article of commerce in the hands of the individual no cleansing process through which the State could put it could change its character.

Section 11 of said Article provides:

"The provisions of this act shall be cumulative of all other provisions of the Civil Statutes, the penal code and the code of criminal procedure, and the remedies herein provided shall be cumulative of all other remedies provided in the Civil Statutes, the penal code and the code of criminal procedure."

It becomes quite apparent, therefore, that this confiscation statute is purely a penalty, and that it was passed to be used as an additional punishment for violators of the conservation laws of Texas. It is our purpose to show that this penalty is so severe and oppressive as to be wholly disproportionate to the offense, and obviously unreasonable, and within the prohibitions of the Due Process Clause of the Fourteenth Amendment. To make this showing it is necessary to call the Court's attention to various provisions of the conservation laws and the regulations of the Railroad Commission:

The oil which article 6066 (a) declares shall be forfeited, is described in Sec. 1, paragraphs (d) and (e) of the Article, as follows:

> "(d) 'Unlawful oil' as that term is used herein shall include oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within said State *in violation of any law of said State, or in violation of any order of the Commission*, and shall include any oil transported in violation of any such law or in violation of any such order."
>
> "(e) 'Unlawful product' shall be construed to include any product, any part of which was processed or derived in whole or in part from unlawful oil or from any product of unlawful oil or from unlawful gas or which is transported in violation

of any order of the Commission or in violation of any law of Texas."

The Legislature of Texas has made unlawful (Art. 6014, R. S. of Texas) the production of petroleum in such a manner or in such amount or under such conditions as to constitute waste. Among the things which it has declared shall constitute waste are the following:

"(a) The operation of any oil well or wells with an insufficient gas oil ratio * * *.

"(c) Underground waste or loss, however caused and whether or not defined in any other subdivisions hereof.

"(e) The creation of unnecessary fire hazards.

"(h) Surface waste or surface loss, including the storage, either permanent or temporary, of crude petroleum oil, or the placing any product thereof in open pits or earthen storage, and all other forms of surface waste or losses, or destructions without beneficial use, either of crude petroleum oil or of natural gas.

"(j) The production of crude petroleum oil in excess of transportation or market facilities or reasonable market demand * * * *."

The production of oil in violation of any of the foregoing provisions or any rule or regulation of the Railroad Commission made pursuant to such provision sub-

jects the petroleum so produced or any product made from it to confiscation under Article 6066 (a).

Article 6049 (c), Sec. 5, R. S. of Texas, requires that all persons producing, storing, transporting, refining, reclaiming, treating, marketing or processing crude petroleum or its products to keep in this State accurate records as to the amount produced, transported, etc. The failure of any such producer, transporter, refiner, etc., to keep such records makes the petroleum or products which he has manufactured or handled, subject to confiscation.

Pursuant to the various Statutes, the Railroad Commission has promulgated many rules and regulations. We quote some of them:

Rule 1 (Special Rules governing the East Texas Field).

> "All flowing wells shall be equipped with and produced through tubing of not more than 2½" in diameter. Bottom of tubing shall not be higher than within one joint of top of producing sand. * * *"

Rule 2:

> "All wells shall be equipped with adequate chokes, or beams, to properly permit the taking of allowable production."

Rule 4:

> "All flowing wells must be produced through a separator, of ample capacity, which separator shall be kept in good working order."

Rule 8:

"The gas oil ratio of each well shall not exceed 500 cubic feet of gas per barrel of oil * * *."

Rule 10:

"All casinghead gas, which cannot be utilized without violating the rules and regulations of the Commission, shall be piped to a point at least 150 feet from any producing well, stock tank, or other fire hazards, and burned. * * *"

Rule 12:

"Any rubbish or debris that might constitute a fire hazard shall be removed to a distance of at least 100 feet from the vicinity of the wells, tanks and pump station. All waste oil shall be burned or disposed of in such manner as to avoid creating a fire hazard or pulluting streams and fresh water strata."

Rule 15:

"All oil produced in said field shall be first measured by being run directly from the well in which it was produced into a lease tank for gauging and the same shall there be gauged by the producer and a record thereof kept and used as the basis for such production reports as are made to the Railroad Commission of Texas. Said lease "tanks shall be located on the lease on which the well whose oil is being measured is located, or on an adjoining lease.

One tank or tank battery only shall be used in the measurement of oil from any well or group of wells located on each lease * * *."

Rule 16:

"All purchasers, producers, pipe line and/or carriers of crude petroleum shall equip their gathering lines from field storage tanks with lockstops. New ball seals with name or initials of gathering or purchasing company, numbered consecutively, shall be attached to each stop cock after each run of oil * * *."

These are but a few of the many statutes and regulations governing the production, handling and refining of petroleum and its products, a violation of any of which makes the oil in connection with which the violation occurs subject to confiscation, and the offender liable to a penalty of not more than $1,000.00 for each and every day of such violation, and for each and every act of such violation as provided by Article 6036, R. S. of Texas, as follows:

"In addition to being subject to any forfeiture that may be provided for by law and to any penalty that may be imposed by the Commission for contempt for violation of its rules, regulations or orders, any person violating any of the provisions of this Act or of title 102, R.C.S. of Texas, 1925, as amended, or violating any rule, regulation or order of the Commission promulgated thereunder, shall

be subject to a penalty of not more than One Thousand ($1,000.00) Dollars for each and every day of such violation and for each and every act of such violation, to be recovered in any Court of competent jurisdiction * * *."

It may be that the penalties provided by Art. 6036, supra, of not more than $1,000.00 for each and every violation and for each and every day of violation, are not so excessive and unreasonable as to fall under the ban of the Fourteenth Amendment, although we believe they closely approach the line, but when, in addition to this penalty, provision is made for the complete forfeiture of all petroleum concerning which any violation has occurred, we think the bounds of reason are passed. Still more unreasonable is the provision of Article 6066 (a) which makes it possible to forfeit any petroleum product, any part of which is derived in whole or in part from unlawful oil. For instance, in the present case the oil which the State seeks to forfeit is fuel oil which the Court judicially knows to be a product of crude petroleum. In order to subject the whole of this fuel oil to forfeiture, it is only necessary, under Art. 6066 (a) to prove that one barrel of the fuel oil has been derived in whole or in part from unlawful oil.

It is assumed that obedience of the various Statutes and rules governing the production, handling and transportation of petroleum is highly desirable, and that violation should properly subject the offender to penalties. It is difficult to believe, however, that under our Con-

stitution the sovereign is permitted to exact, for such minor infractions, penalties of the drastic character provided in Article 6066 (a). We think the whole Statute providing for forfeiture appears on its face to be so harsh, unreasonable and oppressive as to go beyond the limits of the State's power to prescribe penalties for violations of the law. *St. Louis Iron Mountain So. Ry. Co. vs. Williams*, 251 U. S. 63, 64 L. Ed. 139; *Coffey vs. Harlan County*, 204 U. S. 659, 51 L. Ed. 666; *Seaboard Airline vs. Seegers*, 207 U. S. 73, 52 L. Ed. 108; *Waters Pierce Oil Co. vs. Texas*, 212 U. S. 86, 53 L. Ed. 417.

Statement and Argument Under Respondent's Sixth Proposition

Statement

The respondent did not urge in the Courts below, but urges here that Article 6066 (a), Sec. 10, R. S. of Texas, providing for forfeiture of unlawful oil is a direct burden upon interstate commerce and is in contravention of the commerce clause of the Federal Constitution. We assume that the Court judicially knows that the State of Texas contains the largest oil field in the world, that the State is the largest oil producing state in the Union, supplies a great portion of the petroleum and petroleum products moving in our interstate and foreign commerce, and that the major portion of the petroleum produced in Texas moves in commerce to other states, and only a small portion is consumed in Texas.

Argument

Oil produced in Texas and reduced to possession is private property and it and its products are legitimate articles of commerce and the subject of dealings that are nation-wide. The right to own it, to buy it for shipment, and to ship it in interstate commerce is not a privilege derived from State laws and not a right which the State may fetter with conditions and restrictions, but a common right, the regulation of which is committed to Congress and denied to the States by the Commerce Clause of the Constitution. *Lemke vs. Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458; *Schafer vs. Farmers Grain Co.*, 268 U. S. 189, 69 L. Ed. 909; *West vs. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716.

By Article 6066 (a), Sec. 10, the Legislature of Texas has denied the owner of oil produced, transported or handled in violation of any law of the State or rule of the Railroad Commission, the right to put such oil into interstate commerce, and has itself assumed control of the movement of such oil in all commerce. This is so obviously a direct and unlawful burden on interstate commerce that we think there is no need to develop the argument.

We understand that the Court will not pass on these questions if it is possible for it to affirm the Court below on any other grounds. In event, however, the other grounds fail, we seriously urge that this confiscation law is void and unconstitutional.

Conclusion

The respondent respectfully suggests that there is nothing in this case which requires this Honorable Court to grant the application for the writ of certiorari; in the event, however, the Court thinks otherwise and decides to grant the application, the respondent prays that the decision of the Circuit Court of Appeals be in all things affirmed.

Respectfully submitted,

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Attorney for the Respondent.

RUSSELL ALLEN, of Dallas, Texas,
of Counsel.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1937.

No. 28

THE STATE OF TEXAS, AND J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS, *Petitioners*,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR, *Respondent*.

BRIEF FOR DAVID DONOGHUE, Trustee

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E. Duncan & Co., Brief Printers, Dallas

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vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR, *Respondent*.

To the Honorable, the Justices of the Supreme Court of the United States:

Comes now David Donoghue, Trustee of the Trinity Refining Company, Debtor, Respondent in this cause, and respectfully presents this his brief. He asserts that the petitioners have no right to institute confiscation proceedings against the oil in controversy and that all relief for which they pray should be denied.

Propositions Upon Which Respondent Relies:

Proposition No. 1

The Circuit Court of Appeals did not err in holding that the petroleum which the State sought to confiscate was not a nuisance per se, that the title to it was in the debtor at the time the petition for reorganization was filed, and that it passed to and is held by the Trustee as part of the Debtor's estate.

Proposition No. 2

The confiscation statute of Texas (Sec. 10, Art. 6066a, Revised Statutes of Texas) providing for confiscation by the State of so-called illegal oil is void and unconstitutional for that it contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Proposition No. 3

Article 6606 (a), Sec. 10, Revised Statutes of Texas, providing for forfeiture to the State of so-called unlawful oil is a direct burden on interstate commerce and contravenes Article 1, Sec. 8, Clause 3 of the United States Constitution.

Statement and Argument Under Respondent's First Proposition

Statement

The oil in controversy was the property of the Debtor at the time the petition for reorganization was filed.

(Record P. 158, 159). The Circuit Court of Appeals held that the oil was valuable property and was not a nuisance per se, that it passed to the Trustee as a part of the Debtor's estate, and that it was properly in the custody of the bankruptcy court. (Record P. 119). The State of Texas contends that it should be permitted to institute confiscation proceedings against said oil. (Record P. 96). The State offered no evidence.

Argument

(a) In the first place, it strikes us as entirely unreasonable for the State to demand that the bankruptcy court turn over the oil to it so that confiscation proceedings might be instituted, without making any showing to the bankruptcy court that the oil is in fact subject to confiscation, that is, without any showing that the allegations of the State's motion, asserting that violations of the law have occurred in connection with the production and transportation of the oil, are true. We call the Court's particular attention to the fact that the record in this case is wholly barren of any evidence whatsoever concerning the truth of the State's allegations. Certainly, it would seem that before the State could expect the bankruptcy court to release the oil to it for confiscation, it should produce evidence in the bankruptcy court clearly establishing that the oil is in fact subject to confiscation. *In Re Mayer*, 156 F. 432.

(b) It is the State's contention that the Debtor had no property right in the oil at the time the reorganiza-